IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

THURSDAY, THE 23RD DAY OF FEBRUARY 2017/4TH PHALGUNA, 1938

WP(C).No. 35247 of 2016 (E)

PETITIONER(S) :

KNR CONSTRUCTIONS LTD.,
KL 02 PACKAGE PROJECT OFFICE,
XI/706, PAMPAMPALLAM,
ATTAPALLAM, PALAKKAD, PIN-678 621,
FORMERLY AT 12/125, CHANDRANAGAR COLONY 12,
CHANDRANAGAR, PALAKKAD, REPRESENTED BY ITS
DIRECTOR OF PROJECTS, V.VENUGOPAL REDDY.

BY ADVS. SRI.R.MURALIDHARAN (AROOR)
SRI.R.RAMAKRISHNAN POTTY

RESPONDENT(S) :
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1. **THE COMMERCIAL TAX OFFICER (WORKS CONTRACT),**
   CT WORKS CONTRACT OFFICE,
   DEPARTMENT OF COMMERCIAL TAXES,
   PALAKKAD, PIN-678 001.

2. **STATE OF KERALA,**
   REPRESENTED BY THE SECRETARY TO GOVERNMENT,
   DEPARTMENT OF COMMERCIAL TAXES,
   THIRUVANANTHAPURAM, PIN-695 001.

BY GOVERNMENT PLEADER SRI. V.K.SHAMSUDHEEN

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 23-02-2017, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

Msd.

WP(C).No. 35247 of 2016 (E)
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APPENDIX

PETITIONER(S)' EXHIBITS :

EXHIBIT P1 : **TRUE COPY OF THE SANCTION ISSUED UNDER RULE 11(2) OF THE KVAT RULES, FOR THE YEAR 2013-2014 DATED 20-04-2013.**

EXHIBIT P2 : **TRUE COPY OF THE SANCTION ISSUED UNDER RULE 11(2) OF THE KVAT RULES, FOR THE YEAR 2014-2015 DATED 28-05-2014.**

EXHIBIT P3 : **TRUE COPY OF THE SANCTION ISSUED UNDER RULE 11(2) OF THE KVAT RULES, FOR THE YEAR 2015-2016 DATED 09-06-2015.**

EXHIBIT P4 : **TRUE COPY OF THE RETURN FILED BY THE PETITIONER FOR THE 1ST QUARTER OF THE YEAR APRIL TO JUNE 2016.**

EXHIBIT P5 : **TRUE COPY OF THE RETURN FILED BY THE PETITIONER FOR THE 2ND QUARTER OF THE YEAR JULY TO SEPTEMBER 2016.**

EXHIBIT P6 : **TRUE COPY OF THE REVISED RETURN FILED FOR THE 1ST QUARTER OF THE YEAR, FILED ON 25-07-2016.**

EXHIBIT P6(A) : **TRUE COPY OF THE REVISED RETURN FILED FOR THE 1ST QUARTER OF THE YEAR, FILED ON 30-08-2016.**

EXHIBIT P7 : **TRUE COPY OF THE CERTIFICATE ISSUED BY THE 1ST RESPONDENT TO RECEIVE PAYMENTS.**

EXHIBIT P8 : **TRUE COPY OF THE NOTICE ISSUED BY THE 1ST RESPONDENT DATED 19-09-2016.**

EXHIBIT P9 : **TRUE COPY OF THE CIRCULAR NO.18/2016 DATED 27-08-2016.**

EXHIBIT P10 : **TRUE COPY OF THE OBJECTIONS FILED BY THE PETITIONER, DATED 08-10-2016.**

EXHIBIT P11 : **TRUE COPY OF THE ASSESSMENT ORDER PASSED BY THE 1ST RESPONDENT DATED 17-10-2016.**

RESPONDENT(S)' EXHIBITS :

NIL

//TRUE COPY//

P.A.TO JUDGE.

Msd.

K. VINOD CHANDRAN, J.

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W.P.(C)No.35247 of 2016 - E

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Dated this the 23rd day of February, 2017

J U D G M E N T

The assessment order at Ext.P11 is challenged before this Court.

2. The learned Government Pleader vigorously opposes the maintainability of the writ petition, on the ground that an appeal is provided under the Kerala Value Added Tax Act, 2003 (for brevity 'the KVAT Act') and there can be no consideration of the issues raised in the writ petition, under Article 226 of the Constitution of India.

3. The learned Counsel for the petitioner however, based on **State of H.P & Others v. Gujarat Ambuja Cements [2005 (6) SCC 499]** contends that the assessment being not sanctioned by law could be set aside under Article 226 and

there is no requirement for the petitioner to be relegated to the alternate remedy.

4. The facts, with respect to the above writ petition is that the petitioner is a registered works contractor, under the Kerala Value Added Tax Act, 2003. The petitioner was first registered in the assessment year 2013-14. He had only one work in the said year being that of four lining of a section of the National Highway between Walayar and Vadakkanchery. The work extended to the two successive assessment years. The petitioner filed an application for compounding under Section 8(a) of the KVAT Act in all the said three years; 2013-14, 2014-15 and 2015-16. The permissions granted by the Department is produced as Exts.P1 to P3. The contract concluded on 31.10.2015.

5. The petitioner, in the same year ie., in 2015-16 was awarded with another contract of four lining work

between Kazhakkootam and Mukkola. Though the agreement was executed in April 2015, the works commenced only in September 2015. The petitioner on the basis of the permission at Ext.P3 for the year 2015-16, paid compounded tax for the first bill, which was cleared in the assessment year 2015-16. The work continued in the next assessment year also ie., in 2016-17.

6. The petitioner, in the year 2016-17, did not apply for compounding, under Rule 11 of the Kerala Value Added Tax Rules, (for brevity 'the KVAT Rules'). The petitioner filed returns for the first two quarters of the assessment year 2016-17 under regular assessment and also paid tax. The Assessing Officer however, rejected the return and issued notice on the ground that by virtue of proviso (4) of Section 8(a) of the KVAT Act, the petitioner could not have resiled from the compounding for that particular work; since as at the date of

commencement the petitioner had applied and had been permitted compounding. The compounding having been applied for in the assessment year in which the work commenced had to be continued, was the stand of the department. The petitioner's contention is that the petitioner had applied for a compounding in the year 2015-16 but, had specifically not filed any application for the year 2016-17 and there was no compounding applied for that particular work, ie; the second contract obtained by the petitioner.

7. The learned Government Pleader would contend that the petitioner having applied for compounding for all works in the year 2015-16; the second work awarded to the petitioner in that assessment year; would be treated as compounded. The petitioner having paid tax under compounded scheme as against the first bill, on that count too would have to be considered as compounded that

work. The petitioner hence, cannot resile from the compounding by virtue of proviso (4) of Section 8(a) of the KVAT Act. It is also submitted that a dealer, who seeks assessment under the regular scheme, ought to have filed a monthly return and a quarterly return could have been filed only by a dealer under the compounding scheme as is provided under Rule 24 of the KVAT Rules. It is argued that the conduct of the assessee insofar as filing quarterly returns, indicates that he intended to continue compounding.

8. What assumes significance is that the 4^{th} proviso was not available at the time of commencement of the assessment year 2016-17. The resolution of the dispute would require an examination of the provisions as available for the respective years. It is stated in the statement filed that there was a proviso under Section 8(a) of the KVAT Act from the year 2006, which required a dealer, who applied and obtained

compounding for a work in a particular year to continue the compounding scheme till the completion of the work. However, the said proviso was substituted by Kerala Finance Act, 2014; which reads as follows:

> "Provided also that in the case of any work compounded under this clause, and which remains unexecuted fully or partly as on 31st March, 2014, the contractor may continue to pay tax in respect of such works in accordance with the provisions of this clause as existed when he had opted for compounding up to 31st March, 2015".

The earlier proviso as existed from the Kerala Finance Act, 2008 is also extracted hereunder:-

> "Provided also that in the case of any work covered under the above provisions which remains unexecuted fully or partly at the end of the year, the contractor shall continue to pay tax in respect of such works in accordance with the provisions of this clause".

9. Hence, by the use of words "shall"; till 2014 there was a mandate to continue under the compounding scheme once applied for and allowed. In the year 2014-15, the same was substituted by the above proviso, which confined such

continuance till the end of the assessment year ie: upto 31.03.2015. The word 'shall' as employed in the earlier proviso was also changed to 'may'; making the continuance optional. There was no change in the assessment year 2015-16, and hence there was no such proviso, which required a dealer, who had applied for compounding, for a work in the earlier year to continue under the compounding scheme itself in that year also. At the commencement of the assessment year 2016-17 also there was no such requirement. Only by 18.07.2016, the 4th proviso to Section 8(a) of the KVAT Act now relied on by the Assessing Officer was introduced which reads as hereunder:-

> "Provided also that subject to eligibility a work once compounded under this clause, shall remain compounded till the completion of such work".

10. From the time of introduction of the 4th proviso, necessarily there is a mandate to continue the compounding when applied for and allowed in an year; at least of that work

commenced in the year. However, the proviso was introduced only after the commencement of the subject assessment year being 2016-17. The petitioner had not applied for a compounding in that year. The mere fact that the petitioner's work, which commenced in the previous year, had been compounded for that year would not require continuance under the scheme in the subsequent year, for reason of there being no provision available requiring such a continuance.

11. The next submission made by the learned Government Pleader is on the conduct of the petitioner, as revealed from the filing of a quarterly return. It is pertinent that though the petitioner filed a quarterly return and not a monthly return, the petitioner did not show the tax payable under the compounded scheme, but however made a self assessment under the regular scheme itself. In such circumstance, the omission to file a monthly return can only be

considered an inadvertent omission. The Assessing Officer also had not taken any proceedings against the petitioner, for reason of non-filing of monthly returns.

12. Taking the entire facts into account, as also the legal provisions as available in the relevant years, this Court is of the opinion that the assessment order passed at Ext.P11 cannot be sustained, for reason of the same being not sanctioned by law. The impugned assessment order would stand set aside. On returns being filed, if any defect is noticed, the Assessing Officer could re-open the same as provided under the KVAT Act; in any other ground if available.

The writ petition would stand allowed. No Costs.

Sd/-

K. VINOD CHANDRAN,
JUDGE

SB/27/02/2017

// true copy //

P.A to Judge